

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 54-84

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
AFL-CIO

Complainant,

FINAL ORDER

vs.

THE CITY OF DILLON,

Defendant.

No exceptions having been filed, pursuant to ARM 24,26.215,
to the Findings of Fact, Conclusions of Law and Recommended
Order issued on June 26, 1985, by Hearing Examiner Linda Skar;

THEREFORE, this Board adopts that Recommended Order in this
matter as its FINAL ORDER.

DATED this 11 day of October, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Jorgelyn
Alan L. Jorgelyn
Chairman

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 15th day
of October, 1985:

R.G. Dwyer, City Attorney
125 N. Idaho
Dillon, Montana 59725

George Hagerman
AFSCME
Post Office Box 5356
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Jim Jacobsen

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #34-H4

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
APL-CIO

Complainant,

vs.

THE CITY OF DILLON

Defendant

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

On December 28, 1984, the American Federation of State, County and Municipal Employees filed charges against the City of Dillon alleging that the employer, by negotiating an agreement directly with the employees of the City of Dillon, has by-passed the exclusive representative and has bargained in bad faith in violation of 39-31-305 and 39-31-401(5) MCA.

A hearing was held in Dillon, Montana on April 15, 1985 under the authority of Title 39, Chapter 31 and in accordance with the Administrative Procedures Act, Title 2, Chapter 4 MCA. The American Federation of State, County and Municipal Employees was represented by field representative George Hagerman. The City of Dillon was represented by City Attorney Robert Dwyer.

After careful review of testimony and evidence presented at the hearing, I make the following findings of fact:

FINDINGS OF FACT

1. In April, 1984, the American Federation of State, County and Municipal Employees, APL-CIO (APSCME), filed a petition for unit determination and election with the Board of Personnel Appeals. The petition proposed a unit consisting of all employees of the City of Dillon excluding law

1 enforcement officers, fire department and any employees
2 excluded under Sec. 39-31-103(3) and (4) MCA. Subsequently,
3 an election was held and on June 27, 1984, the Board certi-
4 fied AFSCME as the exclusive representative for collective
5 bargaining purposes for those employees.

6 2. After certification, Field Representative George
7 Hagerman met with, and corresponded with members of the
8 bargaining unit, and in a letter to Mayor James Wilson on
9 August 20, 1984, Mr. Hagerman made a formal demand to
10 bargain. Mr. Hagerman suggested that he had September 11,
11 12 and 13th open for negotiations. He asked the Mayor to
12 suggest alternate dates if none of those dates were agree-
13 able. He received no response from Mr. Wilson and again
14 wrote to him on September 4, 1984 (the letter was misdated
15 August 4, 1984). Mayor Wilson responded on September 7,
16 1984, stating that the earliest possible times that the city
17 could meet would be the evenings of October 9th, 10th and/or
18 11th. These dates were over a month in the future.

19 3. On September 13, 1984, Hagerman wrote to Gene
20 Englekes who was president of the bargaining unit.
21 Mr. Hagerman sought a meeting with Englekes and members of
22 the unit negotiating committee to go over their bargaining
23 proposals.

24 4. Toward the end of September, Gene Englekes, Ernest
25 Eddy and other city employees sought out attorney Max
26 Hansen. They had with them a copy of the agreement between
27 police department employees and the City of Dillon. With
28 the understanding that these employees wished to present
29 this contractual format to the Mayor, Hansen reviewed it,
30 made corrections and discussed the provisions with his
31 clients. Hansen was not told of the representation election
32 or that the Board of Personnel Appeals had certified AFSCME

1 as the exclusive representative of the employees in the
2 bargaining unit.

3 5. On or about September 24, 1984, the employees took
4 the proposed agreement to the Mayor. Mayor Wilson stated
5 that this proposal simply reduced to writing those things
6 that were established policies in the City of Dillon such as
7 sick leave, vacation etc. He stated that these policies
8 were things that the City Council had verbally committed to
9 the employees over the years.

10 Mayor Wilson said that he did not negotiate with the
11 employees, there was no compromise and no give and take.

12 The Mayor said that he read the agreement, that it was
13 lying on his desk on October 3 when the employees asked that
14 it be placed on the Council agenda that night. The Council
15 ratified the agreement and on October 4, 1984, it was signed
16 by the Mayor, President Gene Englekes, Vice President Ernest
17 Eddy and Secretary Dan Bloomquist.

18 6. Pertinent provisions of the agreement are:

19 AGREEMENT

20 This agreement is made and entered on this
21 4th day of October, 1984, by and between the City
22 of Dillon, Montana hereinafter referred to as the
23 Employer, and the City of Dillon Employees Association, a local organization of all City employ-
24 ees not including the Police Officers, acting by
25 and through its duly elected officers and repre-
26 sentatives, all of whom are hereinafter referred
27 to as the Association. [Emphasis added]

28 ARTICLE I - Negotiation

29 A. The Employer recognizes the Association
30 as the exclusive representative for all employees
31 of the City of Dillon, not including Police
32 officers, for the purpose of collective bargaining
with respect to wages, fringe benefits and other
conditions of employment. [Emphasis added]

ARTICLE XVII - Grievance Procedure

This section provides a lengthy grievance
procedure which ends in binding arbitration. The

1 services of the arbiter are to be paid for jointly
2 by the City and the Association.

3 ARTICLE XVIII - Termination and Renewal

4 A. This Agreement shall remain in full force and
5 effect from the 4th day of October, 1984, unless
6 it is superceded by an agreement from a certified
7 bargaining agency, otherwise it will continue
8 until the 31st day of July, 1985 and shall renew
9 itself for a period of one (1) year thereafter,
unless either party shall notify the other in
writing at least thirty days (30) prior to the
expiration date that they desire to terminate,
amend or modify the Agreement. [Emphasis added].

10 The phrase "unless it is superceded by an agreement
11 from a certified bargaining agency" in Article XVIII was
12 included at the insistence of City Attorney Robert Dyer.

13 ARTICLE XV - Compensation

14 Neither this section nor any other provides
15 for an hourly, daily, weekly, monthly or annual
16 wage for employees. Instead it provides for time
17 and a half for overtime, holiday pay for cemetery
18 workers and a cost of living increase which,
19 without a base wage, has no meaning.

20 7. Eight city employees signed a petition dated
21 September 27, 1984. This petition was addressed to George
22 Hagerman and informed him that the employees of the City of
23 Dillon had decided not to join the union.

24 This petition was typed on a typewriter with the same
25 unusual typeface used to type letters from the Mayor. In
26 addition, it shows the typist's initials as "dg". These
27 same initials show on letters typed for, and signed by the
28 Mayor.

29 8. In a phone conversation on October 9, 1984, Mayor
30 Wilson informed field representative George Hagerman that
31 the City of Dillon had entered into an agreement with its
32 employees.

1 In a letter to the Mayor, dated October 22, 1984,
2 Hagerman requested a copy of the agreement.

3 9. In a letter dated October 24, 1984, Mayor Wilson
4 refused to furnish a copy of the agreement saying, "It is my
5 feeling that it is the responsibility of the employees to
6 furnish you with a copy of this agreement. Therefore, I am
7 referring this matter to the employees with copies of both
8 your letter and mine."

9 10. On December 20, 1984, AFSCME filed charges in this
10 case.

11 11. In January, 1985, city employees again sought out
12 attorney Max Hansen. On their behalf, Mr. Hansen filed a
13 petition with the Board of Personnel Appeals to decertify
14 AFSCME. In accordance with Section 39-31-210, MCA, which
15 bars a second election in a bargaining unit within a 12
16 month period, the petition was returned by the Board of
17 Personnel Appeals as being untimely filed.
18

19 DISCUSSION

20 Because of the similarity of the Public Employees
21 Collective Bargaining Act and the National Labor Relations
22 Act, the Board of Personnel Appeals and the Montana Courts
23 look to the National Labor Relations Board and the federal
24 courts for guidance in interpreting the Montana act. One of
25 the earlier cases to arise under the National Labor Rela-
26 tions Act is dispositive of the central issue in this case:
27 was the City justified in reaching an agreement with the
28 employees without dealing with the representative of the
29 exclusive representative (AFSCME)? Is this action consi-
30 dered a failure to bargain in good faith and a violation of
31 39-31-401(5)? The factual situation which led to the U.S.
32 Supreme Court decision in Meda Photo Supply v. NLRB, 321 US

1 678, 14 LRRM 581 (1944) was this: The employer had recog-
2 nized a labor union as the bargaining representative of its
3 employees. However, after the recognition, at the request
4 of the employees and upon their statement that they were
5 dissatisfied with the union and would abandon it if their
6 wages were increased, the employer negotiated with them
7 without the intervention of the union, granted the requested
8 increases in wages and thereafter refused to recognize or
9 bargain with the union. The factual situation is much the
10 same in this case. The employees approached the Mayor with
11 a proposed agreement and after slight modification the City
12 signed the agreement recognizing "The City of Dillon Employ-
13 ees Association" as the exclusive representative of the
14 employees. After this, progress toward negotiations with
15 AFSCME came to a halt. AFSCME's representative George
16 Hagerman was even refused a copy of the agreement. The
17 words of the U.S. Supreme Court in Medo have not been
18 modified in the ensuing 40 years and are clearly on point in
19 this case. The Court said:

20 Nor in the circumstances disclosed by the evidence
21 and the Board's findings can we say that it was of
22 any significance whether, as the Court of Appeals
23 thought, the employees' offer to abandon the union
24 originated with them or was inspired by the
25 employer. For in either case, as will presently
26 appear, we think that the negotiations by peti-
27 tioner for wage increases with any one other than
28 the union, the designated representative of the
29 employees, was an unfair labor practice. (empha-
30 sis added)

31 The National Labor Relations Act makes it the duty
32 of the employer to bargain collectively with the
33 chosen representatives of his employees. The
34 obligation being exclusive, see Section 9(a) of
35 the Act, 29 U.S.C. Section 159(a), [roughly
36 equivalent to 39-31-210 and 39-31-305 MCA] it
37 exacts "the negative duty to treat with no other."
38 Labor Board v. Jones & Laughlin, 301 U.S. 1, 44;
39 and see Virginian Railway Co. v. System Federa-
40 tion, 300 U.S. 515, 548-549. Petitioner, by
41 ignoring the union as the employees' exclusive
42 bargaining representatives, by negotiating with
43 its employees concerning wages at a time when wage

1 negotiations with the union were pending, and by
2 inducing its employees to abandon the union by
3 promising them higher wages, violated Section 8(1)
4 of the Act, which forbids interference with the
5 right of employees to bargain collectively through
6 representatives of their own choice.

7 and finally,

8 Petitioner was not relieved from its obligation
9 because the employees asked that they be disre-
10 garded. The statute was enacted in the public
11 interest for the protection of the employees' right
12 to collective bargaining and it may not be
13 ignored by the employer, even though the employees
14 consent, Labor Board v. Newport News Co., 308 U.S.
15 241, 251, or the employees suggest the conduct
16 found to be an unfair labor practice, National
17 Licorice Co. v. Labor Board, *supra*, 353, at least
18 where the employer is in a position to secure any
19 advantage from these practices, H.J. Heinz Co. v.
20 Labor Board, 311 U.S. 514, 519-521, and cases
21 cited.

22 These words of the U.S. Supreme Court effectively
23 destroy the first of several defenses raised on behalf of
24 the City of Dillon: the employees approached the city
25 rather than the city approaching the employees. The other
26 defenses are 1) the City did not bargain with the employees
27 because the agreement merely set forth things which were
28 already established policies in the City of Dillon, 2) the
29 City did not bargain with the employees because there was no
30 give and take and 3) the City never refused to bargain with
31 AFSCME.

32 An analysis of the facts in relation to these defenses
begins with the definition of the verb "bargain". Webster's
Dictionary instructs us that "bargain" means "to come to
terms; AGREE". In other words, the mere fact that an
agreement has been reached between two parties is sufficient
to fulfill the definition of the word bargain. The content
of the agreement, its good or bad qualities are not part of
the definition. Thus, the fact that the agreement with the
employees contained only what was already established policy
in the city is immaterial. Some agreements are to the

1 advantage of one party, some to the advantage of the other.
2 In this case, the agreement proposed by the employees was
3 very much to the advantage of the employer: it contained
4 only what was already established policy in the City. It
5 did not even contain an hourly wage. Such a proposal would
6 cut down the employer's need for give and take. However,
7 the fact that the City inserted the phrase "unless it is
8 superceded by an agreement from a certified bargaining
9 agency" is evidence that some give and take did indeed take
10 place.

11 In examining the last defense of the City, that it
12 never refused to bargain with AFSCME, we must question why,
13 in that case, did AFSCME stop trying to establish times to
14 meet and negotiate? Why did AFSCME charge the City with
15 failure to bargain in good faith? Why did the Mayor refuse
16 to supply AFSCME with a copy of the contract which contained
17 the phrase "unless it is superceded by an agreement from a
18 certified bargaining agency", a phrase which the city
19 believes demonstrates its willingness to negotiate? This
20 phrase could hardly demonstrate anything to AFSCME unless
21 AFSCME was aware of its existence. After the election
22 AFSCME representative George Hagerman made a demand to
23 bargain in a timely fashion. He followed up his initial
24 attempt to establish dates on which bargaining could take
25 place. It is only reasonable to conclude that a meeting or
26 meetings would have taken place had the City been willing to
27 meet and negotiate with AFSCME. Thus, we see little sub-
28 stance in the City's defense and find no extenuating circum-
29 stances. Consequently, we must reach the same conclusion as
30 did the U.S. Supreme Court in Mado. When an employer
31 recognizes another labor organization as exclusive represen-
32 tative and signs an agreement with that organization it is

1 tantamount to a direct refusal to bargain with the exclusive
2 representative and is clearly bad faith vis à vis the
3 incumbent (certified) union.

4 It should be noted that in Mado, supra, the employer
5 was found in violation of both Sections 8(1) and 8(5) and
6 the National Labor Relations Act: interference with employ-
7 ees in the exercise of their rights guaranteed under the act
8 and refusal to bargain. In this case, AFSCME charged the
9 City with failure to bargain in good faith (Section 39-31-
10 401(5) MCA) and failed to charge a violation of Section
11 39-31-401(1) MCA.

12 CONCLUSIONS OF LAW

13 The City of Dillon has violated Section 39-31-401(5),
14 MCA and 39-31-205.

15 RECOMMENDED ORDER

16 The City of Dillon is directed to:

17 1. Cease and desist from refusing to bargain in good
18 faith with AFSCME, the exclusive representative of the
19 employees in the bargaining unit.

20 2. Post copies of these Findings of Fact, Conclusions
21 of Law and Recommended Order on bulletin boards normally
22 used for posting notices. Report to the Board of Personnel
23 Appeals that this directive has been carried out.
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NOTICE

Written exceptions may be filed to these Findings of Fact, Conclusions of Law and Recommended Order, within 20 days after service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620.

Dated this 26th day of June, 1985.

BOARD OF PERSONNEL APPEALS


LINDA SHEAR
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 26th day of June, 1985:

R.G. Dwyer, City Attorney
125 W. Idaho
Dillon, MT 59725

George Hagerman
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P.O. Box 5356
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